

APPEAL NO. 040461
FILED APRIL 21, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 et seq. (1989 Act). A contested case hearing (CCH) was held on January 30, 2004. The hearing officer resolved the disputed issues by deciding that the respondent (claimant) sustained a compensable injury on _____; that the appellant (carrier) is not relieved of liability under Section 406.032(1)(B) because the injury was not caused by the claimant's willful attempt to injure another person; that the carrier is not relieved of liability under Section 406.032(1)(C) because the injury did not arise out of an act of a third person intended to injure the claimant because of a personal reason and not directed at the claimant as an employee or because of the employment; that the carrier did not contest compensability in accordance with Section 409.022 and the carrier's contest was based on newly discovered evidence that could reasonably have been discovered at an earlier date; and that the claimant had disability from October 2, 2003, through the date of the CCH. The carrier appeals the hearing officer's determinations on all of the disputed issues, contending that the hearing officer's determinations are not supported by sufficient evidence and are against the great weight and preponderance of the evidence. The claimant asserts that sufficient evidence supports the hearing officer's determinations on the disputed issues and requests affirmance.

DECISION

Affirmed as reformed herein.

Conflicting evidence was presented on the disputed issues regarding compensable injury, the application of Sections 406.032(1)(B) and 406.032(1)(C), and disability. The hearing officer found that the claimant was injured in the course and scope of his employment; that the incident in which the claimant was injured arose from how the work was being performed and was not due to a personal reason; that the claimant's injury did not result from the claimant's willful attempt to injure another person; and that because of the compensable injury, the claimant was not able to obtain and retain employment at his preinjury wage from October 2, 2003, through the date of the CCH. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established. Although there is conflicting evidence in this case, we conclude that the hearing officer's determinations that the claimant sustained a compensable injury; that the carrier is not relieved of liability under Sections 406.032(1)(B) because the claimant's injury was not caused by the claimant's willful attempt to injure another person; that the carrier is not relieved of liability under Section 406.032(1)(C) because the claimant's injury did not arise out of an act of a third person intended to injure the claimant because of a personal reason and not directed at the claimant as an employee or because of the employment; and that the claimant had disability from October 2, 2003, through the date

of the CCH are supported by sufficient evidence and are not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

Another issue at the CCH was “Did the Carrier contest compensability in accordance with Texas Labor Code Section 409.022 and, if not, is the Carrier’s contest based on newly discovered evidence that could not reasonably have been discovered at an earlier date?” Although there was no disputed issue regarding Section 409.021, we note that because the claimant’s compensable injury occurred on or after September 1, 2003, Section 409.021 as amended effective September 1, 2003, would apply had there been such an issue. The parties stipulated that the carrier timely filed a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21). The TWCC-21 dated October 10, 2003, reflects that the carrier first received written notice of the injury on October 7, 2003. In the TWCC-21, the carrier disputed that the claimant was injured in the course and scope of his employment, stated that the claimant was involved in a personal altercation at the workplace, and asserted that the injury resulted because of a third party’s personal attack on the claimant and not because of the employment. While it is clear that the carrier’s TWCC-21 raised the personal animosity exception found in Section 406.032(1)(C), the TWCC-21 does not assert a defense based on the exception found in Section 406.032(1)(B), which is the employee’s willful attempt to injure himself or to unlawfully injure another person. There is no evidence that the carrier ever filed another TWCC-21.

Section 409.022(a) provides that an insurance carrier’s notice of refusal to pay benefits under Section 409.021 must specify the grounds for the refusal, and Section 409.022(b) provides that the grounds for refusal specified in the notice constitute the only basis for the insurance carrier’s defense on the issue of compensability in a subsequent proceeding, unless the defense is based on newly discovered evidence that could not reasonably have been discovered at an earlier date. The hearing officer found that the carrier “did not properly or timely raise the issue/defense of willful intent to unlawfully injure another” and that “carrier’s evidence regarding this potential defense was not unavailable or unaccessible if they had used reasonable exercise of its duty to investigate the claim.” Conclusion of Law No. 6 states “Carrier did not contest compensability in accordance with Texas Labor Code Section 409.022 and the Carrier’s contest was based on newly discovered evidence that could reasonably have been discovered at an earlier date.”

The carrier contends that the exceptions to liability set forth in Section 406.032 are not compensability issues and thus the hearing officer should not have found that the carrier could not assert its defense of willful intent to injure another person under Section 406.032(1)(B). The Appeals Panel has previously rejected the contention that the exceptions listed in Section 406.032 are not defenses to compensability that do not have to be raised in a TWCC-21. In Texas Workers’ Compensation Commission Appeal No. 990592, decided May 4, 1999, the Appeals Panel stated “We cannot arrive at a reasoned position to conclude that those exceptions to liability set forth in Section 406.032 are other than defenses to the compensability of a claim that need to be timely

raised or result in waiver of compensability by the carrier.” See also Texas Workers’ Compensation Commission Appeal No. 030663-s, decided May 1, 2003. In addition, we note that in Walls Regional Hospital v. Bomar, 9 S.W.3d 805 (Tex. 1999), a negligence case, the Texas Supreme Court noted that some injuries are “not compensable” under the 1989 Act, including those that come under the personal animosity exception in Section 406.032(1)(C). We conclude that the hearing officer’s finding that the carrier did not timely or properly raise the defense of willful attempt to unlawfully injure another person is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain, *supra*. We reform Conclusion of Law No. 6 and that portion of the hearing officer’s decision that address the Section 409.022 issue to state that the carrier may not assert a defense under Section 406.032(1)(B) because that defense was not specified in its TWCC-21 and because it is not based on newly discovered evidence that could not reasonably have been discovered at an earlier time.

As reformed herein, we affirm the hearing officer’s decision and order.

The true corporate name of the insurance carrier is **ST. PAUL FIRE AND MARINE INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
701 BRAZOS, SUITE 1050
AUSTIN, TEXAS 78701.**

Robert W. Potts
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Edward Vilano
Appeals Judge